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One of the most important and far reaching decisions ever rendered by the Supreme Court of Illinois is that recently handed down in the case of Harding v. The American Glucose Company, of Peoria. In that case the court takes advanced grounds and gives its opinion on the most important public issue of the day, that of trusts. It declares the defendant corporation to be a trust, pure and simple, and contrary to the laws of Illinois. According to the history of the case, it appears, in brief, that the complainant Harding, owning a considerable number of shares of stock in the defendant company, an Illinois corporation, with an office, plant and property located in that State, alleged a giant pool or trust for the purpose of unlawfully regulating the price of glucose and grape sugar, they being articles and commodities manufactured and sold throughout the United States. The bill then declared the probable formation of a still greater combine or trust under the laws of New Jersey intended to swallow up its plant in the State of Illinois to his injury. The bill, among other things, prayed for an injunction preventing the defendants from transferring the Illinois plant to the larger corporation. The injunction was denied by the lower court, and thereupon plaintiff filed an amended bill alleging therein the final consummation of the scheme. A demurrer interposed by the New Jersey corporation tested the legal quality of the stockholders' bill, as amended, but sufficient evidence, it seems, was heard to enable the court to proceed to a decree, and, under the charge that the proceeding offended the anti-trust law of this State, the supreme court reversed the action of the lower court, in dismissing the bill, and remanded the cause, with instructions to the circuit court to enter a decree, setting aside the transfer from the American (Illinois) to the New Jersey corporation, including all the contracts, assignments and other instruments accompanying the deeds, and to grant such other and further relief as is consistent under the evidence in the record. The legal questions involved in the case, as outlined by the court, were whether a trust is created when a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property, and will the natural consequence be the controlling of prices, the limiting of production, or the suppression of competition to create a monopoly? The public policy of Illinois, says the court, has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly. In support of this a long line of Illinois decisions is given to the effect that agreements in restraint of trade are void, etc.; also that agreements for welding interests into one grand combination are against public policy.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be verbal, or by understanding, or a scheme not embodied in writing, but evidenced by the actions of the parties.

In the present case, says the court, each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding that each of five other competing corporations was making the same kind of contract and executing the same kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they at least constituted a scheme understood by all the corporations and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose; and in the creation of a monopoly in that business. A part of the scheme was that none of the six corporations or their officers should, for years, engage in the manufacture

of glucose, and this feature of the scheme necessarily contemplated a wiping out of all competition in the business.

The decision in the whisky trust case is cited as substantiating this holding, likewise the Diamond Match case in the Supreme Court of Michigan. The point was not the raising of prices, but the ability and power of the company so to do if it saw fit. It may reduce prices to crush out competition.

"The material consideration in the case of such a combination is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time if it sees fit to do so. It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors. * * * It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations. The test is whether the necessary consequence of the combination is the controlling of prices or limiting of production or suppressing of competition in such a way as thereby to create a monopoly. Necessarily when corporations thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices."

It must, of course, be understood that this case was not a proceeding on behalf of the State against the New Jersey corporation to deprive it of its charter, nor could that be done in Illinois because it is a New Jersey corporation, but if the position maintained by the court finally prevails, then it would be in the power of the Illinois attorney-general to prevent its further operation by injunction.

NOTES OF IMPORTANT DECISIONS.

CHATTEL MORTGAGE—REMOVAL OF PROPERTY—CONSENT—ESTOPPEL.—In Bank of Antigo v. Ryan, 80 N. W. Rep. 440, decided by the Supreme Court of Wisconsin, it appeared that a mortgagor of chattels went, with a prospective buyer, to the mortgagee, who agreed to cancel the mortgage when the buyer had executed a new mortgage, and consented that the buyer should remove the property; relying on which consent, the mortgagor also consented to its removal. The new mortgage was never executed, because of disagreement between the mortgagee and the buyer as to length of credit. It was held that the mortgagee was estopped from enforcing against the seller the original debt. The court said in part:

"To constitute novation, there must be a substitution of one valid and enforceable contract for another. Spycher v. Werner, 74 Wis. 456, 43 N. W. Rep. 161. Whether there was such a new contract here we find it unnecessary to decide, because the facts show that the plaintiff is estopped from now claiming any liability on the part of Ryan. Ryan owed the bank, and had in his possession ample property to pay the debt with. He refused to part with this property because it was pledged as security for that debt. The bank, in substance, requested him to turn it over to the Ingersol Company, because the Ingersol Company had agreed to assume Ryan's debt and give their own note and securities therefor. Acting upon this request or consent, Ryan turned over the lumber, and thus devested himself of an ample fund with which to pay his debt. The act of the bank clearly induced this change of position on the part of Ryan. To allow the bank now to disaffirm the act and claim that the Ingersol Company did not succeed in assuming the debt, and therefore that Ryan is still liable therefor, would amount to a fraud on Ryan, and hence would be a clear violation of the law of estoppel. Though the defense of estoppel was not pleaded in express terms, still all the facts essential to constitute the estoppel were alleged."

EVIDENCE — HEARSAY — DECLARATIONS OF THIRD PERSONS.—The Supreme Court of Utah, reversing the lower court, decides, in Jensen v. McCornick, 58 Pac. Rep. 834, that declarations of third persons are inadmissible in evidence on the ground that they are hearsay, when it does not appear that they were a part of the *res gestæ*, or were made in the presence of the party sought to be charged, and acquiesced in by him. The court says in part:

"We are of the opinion that the court erred in allowing the witnesses to testify to the conversation with Bitner and Studebaker's agent, and in allowing their declarations to be admitted in evidence, in the absence of the defendant. The declarations were clearly hearsay, incompetent, and prejudiced to the defendant. What Bitner, a stranger to the record, said concerning Katz's interest and his own, and the transfer of the Katz lease, was not competent evidence against McCormick. Katz was not a party to the action,

and McCormick, not being present, should not be prejudiced by the declarations of a third party. The plaintiffs were seeking to show by hearsay testimony, in the absence of the defendant, that the title of McCormick and Katz to the property was incumbered and imperfect, and that a transfer thereof could not be obtained, as a reason why the plaintiffs could not be bound by the contract of sale. The plaintiffs tendered the issue that the defendant's title was imperfect, and that he could not convey a perfect title to the wagons. This was the burden of their complaint, and the reason given for not completing the transaction, if it was not completed, both in the complaint and admitted proof. If the fact of the failure of the title was competent,—and it appears to have been so—the plaintiffs should have called and had sworn the witnesses conversant with the facts, and not have relied upon the unsworn declarations of strangers to the record, made in the absence of the defendant, to prove their case. Bitner and Studebaker's agent knew what they meant to communicate, but the witnesses did not know. The witnesses might not have heard or repeated correctly what they heard or supposed they heard. The conversation might have been had in accordance with a previous agreement between them, for the purpose of being used in the case, if necessary. By such admissions the plaintiffs could easily be taken by surprise, and precluded from the benefits of a cross-examination, because all the witness would have to say was that he had been told so and so, and there the inquiry would stop. A person who relates a hearsay is not required to enter into any particulars, solve any inconsistencies, or explain any obscurities or remote ambiguities. He simply falls behind the assertion that he was told so and so, and leaves the responsibilily entirely upon an absent author of the statement. The propriety of admitting such testimony as primary evidence is against sound reason and principle, and would awaken distrust and create uncertainty in legal proceedings. This class of testimony should never be resorted to as long as primary evidence exists of the fact.

The only way the statements of Bitner and Studebaker's agent could be of any avail to the plaintiffs was by calling and making them witnesses in the case. They were competent to testify to the incumbrance or failure of title to the property in question. What they may have said out of court concerning it, in the absence of defendant and the parties in interest, is clearly hearsay and incompetent. Plaintiffs did not state to McCormick the conversation had with Bitner and the agent of Studebaker, but simply stated that Katz could not transfer, and that the wagons were not clear. What was said by plaintiffs to McCormick on the subject of title was competent on the trial, but what was said by Studebaker's agent or Bitner to plaintiffs, in the absence of defendant, was not competent evidence on the trial, even if communicated to McCormick thereafter.

In McClure v. Sheek (Tex. Sup.) 4 S. W. Rep. 552, plaintiff offered in evidence the declaration of one in charge of cattle in question, to the effect that they belonged to S, through whom plaintiff claimed, and it was held that the evidence was strictly hearsay, and properly excluded. Such declarations of third parties are inadmissible in evidence, on the ground that they are hearsay, when it does not appear that they were a part of the *res gestæ*, or were made in the presence of the party sought to be charged, and acquiesced in by him; 9 Am. & Eng. Enc. Law (2d Ed.) 6; Coleman v. Southwick, 9 Johns. 45. In Coleman v. Southwick, *supra*, it was held that where A published a libel taken from a paper published by B, as an extract from a paper published by C, it was held, in an action brought by C against A, that the testimony of D that he heard A, before he published the libel, ask E whether he had not seen it in the paper of C, and E answered that he had, was inadmissible in mitigation of damages, but that E himself should have been produced."

INJUNCTION—LEGAL REMEDY—VALIDITY OF CHATTEL MORTGAGE.—In Jersey City Milling Co. v. Blackwell, 44 Atl. Rep. 153, decided by the Court of Chancery of New Jersey, it was held that equity will not entertain a bill by a creditor of a mortgagor, where he has acquired the legal title to the mortgaged chattels of his debtor by a sale thereof under an attachment, to enjoin a sale by the mortgagee on foreclosure of his mortgage, executed prior to the attachment, but claimed by the creditor to be invalid on the ground that it does not state the consideration therefor, and for the determination of its validity, as the parties have an adequate remedy at law, by replevin. The court said:

"Complainant, as a creditor of one De Vita, a non-resident, issued an attachment, upon which certain buildings owned by him, and located on another person's lands, were attached. The defendants Dolton & Co. hold a chattel mortgage on the buildings, which was filed before the issue of the writ, but the validity of which it attacked by reason of the insufficiency of the affidavit to the chattel mortgage. It is claimed that the affidavit fails to state the consideration of the mortgage, as required by the Chattel Mortgage Act. Gen. St., p. 2113, sec. 5. Before the filing of the bill the auditor in attachment had sold the goods in question to complainant at public sale, under the statute, for $50, which sale has been confirmed; and, as stated by complainant's counsel, a deed for the property has since been delivered by the auditor to the complainant. The property sold was inventoried at $235. The mortgagees are in actual possession of the property, and have advertised its sale under their mortgage, the sale being stayed pending this application for injunction.

The complainant, by the sale and deed, has now the legal title to the property, and no longer stands merely upon its rights, as a creditor, to the assistance of a court of equity to enforce its

lien. The preliminary question is whether, as such purchaser and holder of the legal title, he is entitled to an injunction, in order to settle in this court the invalidity of the chattel mortgage under the statute. This invalidity, by reason of defective affidavits, is one which avoids the mortgage in courts of law as well as of equity; and complainant's right to bring the decision of the question into this court, rather than in a court of law, and trial by jury, must be based on the insufficiency of the remedy at law. Such insufficiency of legal remedy exists where a creditor has a lien upon the mortgaged property, and the removal of the invalid lien is necessary in order that he may realize his debt by a sale clear of the alleged lien, and the jurisdiction of a court of equity to decree the statutory invalidity of a chattel mortgage on the bill of a creditor holding a lien, or one who represents such creditors and stands in their rights, seems to be settled. In Currie v. Knight (Van Fleet, V. C.; 1881, 34 N. J. Eq. 485, 487), complainant held a lien as the creditor of an insolvent estate. In Hopper v. Lovejoy (Err & App. 189, 47 N. J. Eq. 573, 21 Atl. Rep. 298), complainant was a receiver of an insolvent corporation, who was held to represent the creditors, and in this capacity entitled to avoid the lien (Stevens, V. C., page 577, 47 N. J. Eq., and page 298, 21 Atl. Rep.); and the court of errors and appeals decided the question of the validity of the mortgage on the same basis. Dixon, J., page 578, 47 N. J. Eq., and page 298, 21 Atl. Rep. In Button Co. v. Spielman (Van Fleet, V. C.; 1892, 50 N. J. Eq. 120, 24 Atl. Rep. 571), the right of the receiver to attack the invalid mortgage in equity was expressly based on the lien of a creditor on the property, resulting from the adjudication of insolvency, and the receiver's rights as representing creditors who had such lien. Page 127, 50 N. J. Eq., and page 574, 24 Atl. Rep. It was not at all based on the receiver's title to the property, as succeeding to the rights of the insolvent mortgagor. This opinion was adopted on appeal. 1893, 50 N. J. Eq. 796, 27 Atl. Rep. 1033. In Roe v. Meding (Err & App., 1895, 53 N. J. Eq. 350, 33 Atl. Rep. 394), on a like bill by the receiver of an insolvent corporation the chattel mortgage was held void because of failure to record immediately, as required by statute, but only as against those creditors, represented by the receiver, whose debts were incurred prior to the recording. Page 369, 53 N. J. Eq., and page 395, 33 Atl. Rep. These cases show that up to the present time all equitable jurisdiction to set aside chattel mortgages for a failure to comply with the statutory provisions which avoid them at law as well as in equity has been based ultimately on the equitable jurisdiction to assist in the enforcement of a legal lien. There is a class of cases in New Jersey where a court of equity, on the application of a purchaser of lands under judgment, has entertained jurisdiction to set aside a prior conveyance as fraudulent against the creditor, under whom the purchaser claims, but this is based on the jurisdiction against frauds. Smith v. Espy, Williamson, Ch., 1852, 9 N. J. Eq. 160, 166. This jurisdiction in equity to set aside fraudulent deeds existed before the statute of frauds, which made such deeds void at law as well as in equity. Phelps v. Morrison, 25 N. J. Eq. 538, 544. Complainant's counsel has referred me to no case in our courts where the jurisdiction of a court of equity has been exercised merely to try the validity of a chattel mortgage invalid at law as well as in equity, under the registry laws, on the application of the holder of the legal title to the mortgaged property. Nor have I been referred to any case in which complainant, having the legal title to the lands, has been held entitled to file a bill in equity for the sole purpose of setting aside either a deed or mortgage claimed to be void against him under the recording acts. Such jurisdiction in reference to lands, where exercised in equity, is based solely on the statutory right to file a bill to quiet title, and, if entertained on any theory of general equity jurisdiction in such cases, would manifestly draw into this court, and away from trial at law and by jury, the settlement of many questions of purely legal title. I am not disposed to extend the jurisdiction to cases of the present character, where the insufficiency of the ordinary legal remedy does not appear. In this case complainant may, by action of replevin or tort, have a full remedy, either by recovery of the property or in damages. The value of the property is not large, the mortgagees are not alleged to be irresponsible, and it is a case where the property appears to be valuable, not for the possession of the owner, but solely for the purpose of realizing thereon by sale. It is a case where, in my judgment, the complainants should be remitted to their legal remedy."

STATUTE OF FRAUDS—SALE OF GOODS TO BE MANUFACTURED—DELIVERY AND ACCEPTANCE.—In Mechanical Boiler Cleaner Co. v. Kellner, decided by the Supreme Court of New Jersey, it appeared that plaintiff contracted for the sale to defendant of certain patented articles, in the manufacture of which he was engaged, which were either on hand at the time or were to be manufactured in the regular course of his business. It was held that such contract was one of sale, within the statute of frauds of New Jersey, as the statute is applicable to both executed and executory contracts of sale, whether the articles exist at the time or are to be made in the general course of the business in which the seller is engaged. It was further held that a buyer's taking goods in possession to test, to enable him to determine whether or not he will buy, is not an acceptance, within such statute of frauds; nor will his expression of satisfaction with the experiment after the trial suffice, so as to constitute an acceptance of goods sold. There must be some unequivocal act, with intent to take possession as owner. The court said:

"Martin, the agent of the defendants, refused to sign a written order. The contract was in parol. No payment was made on account. The case, therefore, must turn upon the question whether there was an acceptance of the goods and an actual receipt of them, within the meaning of the statute. Counsel at the trial did not present the statute of frauds as applicable to this case, and the learned judge in his charge to the jury instructed them that if they found there was a sale of these goods—a conditional sale—and the evidence satisfied them that the condition was performed, so that the sale became an absolute sale, then the plaintiff was entitled to recover. This instruction was aside from the effect of the statute of frauds. The issue presented under that statute would involve, also, the important question whether the goods were accepted and actually received by the defendants, within the meaning of the statute. The question as to what is an acceptance and actual receipt of goods, within the purview of the statute, is one on which the decisions are at variance. These propositions may be considered as settled by the great weight of authority in England, as well as in the courts of this country, and the doctrines embraced in them accord with the reasons which gave rise to this important statute: First. The statute is not complied with unless two things concur: The buyer must accept and actually receive part of the goods, and the contract will not be good unless he does both. Second. There may be an actual receipt without acceptance, and an acceptance without a receipt, and acceptance to be inferred from the assent of the buyer, meant by him to be final, that the goods are to be taken by him as his property under the contract. Third. It is immaterial whether the buyer's refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is clear that he does not accept the goods. The question is not whether he ought to accept, but whether he has accepted them. Fourth. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts. These propositions are abstracted from Blackb. Sales, pp. 22, 23, and adopted by Mr. Benjamin in 1 Benj. Sales (Corbin's Ed.), sec. 139. Another proposition that is vouched for, upon principle and by the weight of authority, is that possession of itself is not evidence of an acceptance, and, that a compliance with the statute would require an acceptance by the vendee as owner. In Phillips v. Bristolli, 2 Barn. & C. 511, a purchaser of some jewelry at an action sale held it in his hands for a few minutes, and tendered it back to the auctioneer, saying that there had been a mistake. In an action to recover the price of the jewelry, the court held 'that, to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting a right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking possession as owner.' This language was adopted by Gardiner, J., in Shindler v. Houston, 1 N. Y. 261, the learned judge adding: 'This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale, unequivocally indicating the mutual intention of the parties.' In Parker v. Wallis, Lord Chief Justice Campbell said: 'Of the law there is no doubt. To make an acceptance, it is not necessary that the vendee should have acted so as to preclude himself from afterwards making objection to the quality of the article delivered; but he must have done something indicating that he has accepted part of the goods, and taken them as owner. This may be indicated by his conduct, as when he does any act which would be justified if he was the owner of the goods, and not otherwise. In such a case the vendee, doing that act, is supposed to have accepted the goods and become the owner of them.' 5 El. & Bl. 21, 26. In Hinchman v. Lincoln the Supreme Court of the United States held that, in order to take an alleged contract of sale out of the operation of the statute of frauds, there must be acts of such character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price. 124 U. S. 38, 46, 8 Sup. Ct. Rep. 369. See Morton v. Tibbett, 15 Adol. & E. (N. S.) 428, 438. In Remick v. Sandford in was held that, in an action for goods sold and delivered, an acceptance to take the case out of the statute of frauds must consist of some unequivocal act of acceptance, and, if the goods were sold by sample, it is not enough for the vendor to show merely that the goods came into the possession of the buyer, and that they corresponded with the sample. There must be proof of an acceptance by some unequivocal act done on the part of the buyer, with intent to take possession of the goods as owner. 120 Mass. 309, 316, where payment is relied on as the compliance with the statutue, words are not sufficient. Some act in part performance or part execution of the contract, such as the surrender or cancellation of the evidence of the debt or a receipt or discharge of the indebtedness, is necessary to make the contract valid. Refining Co. v. McMahon's Admr., 38 N. J. Law, 536, 540. In Finney v. Apgar, 31 N. J. Law, 266, the contract between the parties was for the delivery of spokes 'at the dockyard below Brookville, the plaintiff to pile them up on the left hand side of the road.' This was done by him. Although it was a delivery in compliance with the contract, the court held that it was not an acceptance within the statute. Morton v. Tibbett was approved. A like decision was made in Pawelski v. Hargreaves, 47 N. J. Law, 334, 337. In that case it appeared that, after the trucks were received at the plaintiffs' factory, some slight alterations in them were made by the plaintiffs at the defendants' request, and that the defendants had engaged a painter to paint and letter the trucks. The rule deduced from these cases as the rule in force in this State is the En-

glish rule—that, to constitute an acceptance, there must be an acceptance by some unequivocal act, with intent to take possession of the goods as owner. The question of acceptance and actual receipt, being one of fact, will depend upon the circumstances of the particular case. Whether the acts which the buyer does or forbears to do amount to an acceptance and receipt, within the statute of frauds, is a question for the jury; but where the facts in relation to a contract of sale, within the statute of frauds, are not in dispute, it belongs to the court to determine their legal effect, and to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance and actual receipt. Norman v. Phillips, 14 Mees. & W. 277; Stone v. Browning, 68 N. Y. 598; 1 Browne, St. Frauds, sec. 321; Hinchman v. Lincoln, 124 U. S. 48, 8 Sup. Ct. Rep. 369. Placing the property in charge of the vendee for the purpose of testing it, with a view to enable the vendee to decide whether or not he will buy, is obviously not such an acceptance as will comply with the statute. Stone v. Browning, 68 N. Y. 598. Nor will the expressing of satisfaction with the result of the experiment by the vendee after the trial amount to an acceptance. Testimony to that effect would show that the purchaser approved of the quality of the goods, but is inadequate to establish an acceptance by him as owner. In the case now in hand, it appears that the defendants distinctly refused to purchase, and there is no phase of the transaction upon the testimony, as it appears in this case, that would justify a finding that there had been an acceptance, within the meaning of the statute."

CRIMINAL EVIDENCE—HOMICIDE—RES GESTÆ—DECLARATIONS DURING FLIGHT.—In Johnson v. State, decided by the Supreme Court of Wyoming, which was a prosecution for homicide, it appeared that almost immediately after deceased was shot he was carried into a house by defendant and others, and within an hour afterwards, on being asked how it occurred, he said defendant shot him, but did not intend to. It was held, after a discussion of the authorities, that the declaration was admissible as part of the *res gestæ*. The court says:

"Almost immediately after being shot, the deceased was carried into the house by the defendant and others. The defense offered to prove that, a short time after being carried in, the deceased, upon being asked how it occurred, said, 'Johnson shot me, but he did not intend to do it.' The witnesses say that they do not know how long after the shooting this statement was made; that it may have been half an hour or an hour; that it was not long. The evidence was excluded, as not being a part of the *res gestæ*. The question is confessed to be one of much difficulty, and the cases are very numerous, and not very harmonious. The early rule was very strict that the declaration must be precisely contemporaneous with the main transaction charged as an offense. Later, it has been held that the element of time is not always material, that no general rule can be stated, but that each case must stand upon its own facts. But it seems to be generally held, if the statement is mere narration, wholly unconnected with the principal fact, it is inadmissible. Upon the other hand, if it springs spontaneously out of the principal fact, is in direct connection with it, and is illustrative and explanatory of it, the declaration should be admitted, although it may be narrative in form, and although it may be separated from the principal fact by a lapse of time more or less considerable. We refer to a few of the cases as illustrating the circumstances under which it has been deemed proper to admit the evidence. In State v. Martin, 124 Mo. 529, 28 S. W. Rep. 12, the deceased was stabbed on the street at night. The witness stated that he heard him cry, 'Police!' but, supposing he was drunk, walked across the street from him; but seeing him fall, and hearing him say, 'I am fainting,' ran across the street to him. The wounded man was then carried into a saloon across the street from where he fell. At the suggestion of some one, the witness ran a block and a half for a physician, who put his head out of the window, and said he could not come. The witness ran back, and reported that the doctor could not come. In a moment or so some one asked the wounded man, 'Do you know who did it?' and he answered, 'Yes; two negroes,—one a little yellow fellow.' No one having stated in his presence who did it, the court held that it was properly admitted as a part of the *res gestæ*, and the court say the statement might well be considered a part of the sentences he uttered immediately after the fatal stab had been inflicted; that it was not a mere narrative, unsupported by the principal fact, but was in direct connection with it, and illustrative and explanatory of it; that no sensible man would reject such evidence in his own affairs; and numerous cases are cited by the court illustrating the propriety of the decision. In Com. v. McPike, 3 Cush. 181, the defendant was indicted for stabbing and killing his wife. The deceased had run from the room where it occurred to another room in the same house, a story above. On being admitted, she had asked that a priest and a physician be called, saying she was killed. A witness immediately started for a physician. Another witness, attracted by the cries of the deceased, and going towards the room, met the first witness coming out. Upon being cautioned not to go in, that the defendant would kill him, he went for a watchman, and, coming back, went immediately to the room. The deceased then told him that the defendant had stabbed her, and what she wanted done if she died. It was held that the evidence was properly admitted as part of the *res gestæ*. In Insurance Co. v. Mosley, 8 Wall. 103, the contest between the parties was upon the question of fact, whether the deceased died from the effects of an accidental fall downstairs in the night or

from natural causes. The witness testified that the deceased left him between 12 and 1 o'clock; that when he came back he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling downstairs; he complained of his head, and appeared to be in great pain. The court in that case say that to bring such declarations within the principle, generally, they must be contemporaneous with the main fact to which they relate, but that the rule is by no means of universal application, and the evidence was held to have been properly received. Railroad Co. v. Coyle, 55 Pa. St. 396, was a suit by a peddler on account of injuries to himself and wagon from being struck by a train. The court say: 'We cannot say that the declaratian of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of, and immediately after the happening of, the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company, as a part of the very transaction itself.' Although the declarations were evidently made after the accident, and when the transaction was entirely past, the court speak of them as made 'at the time of the accident;' and with entire accuracy, we think, for they were made under the direct and immediate influence of the transaction. In Lewis v. State, 29 Tex. App. 201, 15 S. W. Rep. 642, declarations of the deceased made a half hour to an hour and a half after she was wounded were held, under the circumstances of that case, to be *res gestæ* and admissible. And the court say: 'In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence.' In Fulcher v. State, 28 Tex. App. 471, 13 S. W. Rep. 750, statements of the deceased as to the circumstances of the shooting, made about half an hour afterwards, were held to be admissible as *res gestæ*. In Com. v. Werntz, 161 Pa. St. 597, 29 Atl. Rep. 272, the deceased had been carried from the shed where he was wounded to a barber shop on the other side of the street, and across a lot, and there made certain statements to the surgeon who dressed his wounds as to the identity of his assailant, which were excluded as too remote by the trial court. The supreme court, in holding the exclusion to be error, say: 'The interval of time from the stabbing and the distance of the barber shop from the shed do not appear with exactness, nor are they material; for it is apparent that they were not great, and that the continuity of the events was not broken. The declarations were by the party best informed and most interested, and were made at a time and place, to a person, and under circumstances which effectually exclude the presumption that they were the result of premeditation and design.' As illustrating that the element of time is not held to be controlling, in a New Jersey case, the deceased was assaulted at night in Camden, and received wounds from which he alterwards died. Statements of the deceased made that afternoon in Philadelphia, that he intended going to Camden that evening in company with the defendant, were held to be admissible as part of the *res gestæ*. Hunter v. State, 40 N. J. Law, 495. In State v. Sloan, 47 Mo. 604, the defendant offered to prove that while the surgeons were dressing the wounds of Moore, for whose murder he was being tried, and immediately after the shooting took place, Moore said: 'Sloan was not in fault, that he had drawn on the difficulty by attacking him, and that if his pistol had not hung when he went to draw it he would have killed him.' It was held that the evidence was improperly rejected by the trial court, being admissible as part of the *res gestæ*. 1 Starkie, Ev. p. 65, in discussing the rule that excludes hearsay, says: 'The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.' And Lord Denman is quoted as saying in Rouch v. Railroad Co., 1 Q. B. 60: 'The principle of admission is that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary upon good grounds, for the nature and strength of the connection with the act are the material things to be looked to, and, although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential;' and, further, 'that, if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*.' And Wharton says (Cr. Ev. § 263): 'The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense: that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. * * * Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' And he explains 'that immediateness is tested by closeness, not of time, but by causal relation.' In the case now under consideration, the declaration is so naturally and closely associated with the principal act that the connection could not be clearer if it had been made at the moment of the shooting. There is nothing in the evidence which gives countenance

to the idea that the statement was an afterthought, that it was influenced by any third person, or by any ulterior motive. Indeed, the circumstances effectually preclude such idea. The deceased was suffering from the pain of a mortal wound, and would not be likely to be inventing excuses for his slayer. Moreover, at the moment he was shot, his first exclamation was addressed to the defendant himself, as if informing him of a fact which he did not intend and would not know: 'Oh, Johnson! You have shot me.' The statement under consideration may fairly be deemed a continuation of the first remark. It was not necessary, in giving the information to Johnson, to add, 'You did not intend it;' for, in his view, this was known both to the defendant and himself. But when addressing others, who might not know it, he expressed his idea in full: 'Johnson shot me, but he did not intend to do it.' We think the two remarks, taken together, are as clearly part of the *res gestæ* as if at the moment of the shooting he had said: 'Johnson, you have shot me, but you did not intend it.' While the weight and value of the evidence were for the jury, that it was very material for the defense cannot be questioned, and its exclusion was error."

ARE MUNICIPAL CORPORATIONS LIABLE TO DE JURE OFFICERS FOR SALARY PAID TO DE FACTO OFFICERS?

This subject may be discussed under two general heads:

1st. By giving a resume of the usual arguments, both for and against liability. 2d. By the citation and analysis of the leading cases.

1st. It has been a much mooted question whether a municipal corporation is liable to a *de jure* officer for salary paid a *de facto* officer, where it has been paid in good faith before judgment of ouster. The authorities do not agree on the question, and as a matter of fact cannot be reconciled. It may safely be said, however, that the weight of authority is to the effect that the *de jure* officer cannot recover. Before entering into a discussion of the subject, it is necessary to have clearly in mind how the courts have defined *de jure* and *de facto* officers. It is important to discriminate between *de facto* officers and usurpers, for the latter have no right at all unless they remain in office long enough to become officers *de facto*.

A *de facto* officer has been defined to be one who has the reputation of being the officer he assumes to be, but is not so in point of law. A *de jure* officer is one who has lawful right to office in all respects, but who has either been ousted or has never taken possession. The reasons which have been advanced for exempting a municipal corporation from paying a *de jure* officer salary which has been paid a *de facto* officer are numerous. It has been contended that a municipal corporation ought not to be liable on the ground that the *de jure* officer has done no work during the time that the *de facto* officer was the incumbent of the office. This reason seems unsound, inasmuch as the law permits the *de jure* officer to recover from the *de facto* officer. Some courts hold that a *de facto* officer can compel a municipal corporation to pay him the salary attached to the office; that the title to an office cannot be tried in a collateral proceeding. Other courts hold, however, that when an officer sues for salary his title is in question. And in those courts that hold that title to an office cannot be attacked in an action brought by a *de facto* officer to recover salary, it is clear that the disbursing officer has no option but to pay. An officer *de jure* in those States cannot recover salary which has been paid to a *de facto* officer in good faith before judgment of ouster. On the other hand, it is argued that an officer's title to office may be attacked collaterally, and hence that a voluntary payment of salary to a *de facto* officer by a municipality is no defense to an action brought by a *de jure* officer for the same salary. But if the corporation pays the salary to the *de facto* officer after he has been declared ousted by a proper court, then the *de jure* officer may recover said salary from the municipality.

A distinction has been made by some courts where the municipality was a party to the wrong in ousting the *de jure* officer. This point was decided by the Supreme Court of Michigan in Stalder v. The City of Detroit.[1] In that case Stalder was elected for a term of two years, and after serving one year was ousted by the common council. The common council then appointed one Mahoney to office, who entered on the duties of the said office, and drew the salary of the second year. In an action by Stalder against the city for salary he was allowed to recover for two years, although the salary for the last year had been paid Mahoney.

[1] 13 Mich. 346.

California, and possibly two other courts, hold that a *de jure* officer can recover the whole salary attached to his office, when his right to such office has been finally determined, notwithstanding the fact that the salary has been paid to an officer *de facto*. It is argued in favor of this policy that the salary and emoluments to office are incident to the true title, and not to the occupation of the office. Courts that hold the above rule maintain that a *de facto* officer may not recover his salary in an action at law, for his title to office would then be put in question. The title thereupon proving defective, he could not recover. And if he could not recover in an action at law, then the payment of the salary was voluntary and wrongful, for which the municipal corporation ought to be held liable. But this argument proceeds upon the theory that disbursing officers are not justified in relying on the *prima facie* title of an officer *de facto* in paying salaries, and such a policy practically imposes judicial functions on disbursing officers, if they are bound to know when they pay salaries whether the payee is a *de jure* officer or not. Such a function is one that can be properly performed by the courts alone.

The law of this subject may be summarized in the following propositions, as will be more fully seen by the examination of the authorities hereafter cited:

1. The authorities are irreconcilable on the main proposition.

2. By the great weight of authority, however, where a municipality or other public body, in good faith and before judgment of ouster, has paid a *de facto* officer salary attached to his office, the *de jure* officer cannot recover said salary from the municipality or other public body.

3. By weight of authority the *de jure* officer may recover said salary from the officer *de facto*.

4. A distinction has been made by some courts in cases where the municipality has been "a party to the wrong" in keeping the *de jure* officer out. In such cases the *de jure* officer may recover.

5. If the municipality pays the *de facto* officer salary after judgment of ouster, such payment is wrongful, and the *de jure* officer may recover such salary from the municipality.

6. The courts argue against non-liability under the circumstances outlined, on the ground that it is contrary to "public policy" to compel a municipality to pay twice for the same service, as would often be the case if *de jure* officers could always recover from municipalities where the salary had already been paid to an officer *de facto*. It is also argued that disbursing officers may rely on the *prima facie* title of officers *de facto* in paying salaries, and that they could not otherwise safely perform their duties. And it is further contended that to hold the contrary doctrine is to force "judicial duties" on disbursing officers.

2d. We may now take up the second division of the subject under discussion, and cite the authorities in support of the propositions advanced. In the case of Auditors v. Benoit,[2] Miller and Benoit were candidates for the office of treasurer of Wayne county. The board of canvassers awarded the certificate of election to Miller, who entered on the performance of his duties and collected the salary attached to his office during his incumbency. Benoit pressed his claim in the courts, and was finally declared elected. In settling with the county, Benoit deducted from the county funds salary for the whole term of office. An action was brought by the county against him for the amount which had been paid Miller as officer *de facto*, and the question was raised in this case whether the *de jure* officer was entitled to salary for the whole term, when the *de facto* officer had been paid for the time he had been in office. The court held the *de jure* officer could not recover. The dissenting opinion of Judge Cooley in that case, however, is cited by other courts in support of the contrary doctrine. If there had been any doubt left concerning the Michigan doctrine, a decision[3] of the supreme court in 1895 settles it. In April, 1893, James A. Scott and Charles Glaser were candidates for the office of comptroller of West Bay City. On a recount Glaser was declared elected by the common council acting as a board of canvassers. He promptly entered on the duties of his office, and collected his salary in the meantime. Later, Scott was seated and Glaser was ousted. In an action by *mandamus* to re-

[2] 20 Mich. 176.
[3] Scott v. Crump, 106 Mich. 288.

cover salary for the whole term, it was held that Scott could not recover for the period he was not in office. The defense was that the salary had been paid Glaser, the officer *de facto*, in good faith. It appeared that a part of the salary had been paid Glaser after judgment of ouster. With regard to this sum, the court held the municipality liable. The New York courts overwhelmingly support this doctrine. In the case of Terhune v. Mayor,[4] the plaintiff was appointed inspector of combustibles by the fire commissioners. He was removed from said office and another appointed to fill the vacancy. Terhune maintained that his removal was illegal, and the courts so held. He was thereupon reinstated. The *de facto* officer, until the reinstatement of Terhune, performed the duties of the office and collected the salary attached. In an action by Terhune to recover the salary paid the *de facto* officer, the court held there could be no recovery. It was there said that the payment of the salary of an officer to an officer *de facto*, while he holds the office and discharges its duties, is a defense to an action by the *de jure* officer to recover the same salary. The court further said that the *de jure* officer should have begun proceedings by *certiorari* to restrain the officer *de facto* from collecting the salary.

Such was likewise the doctrine laid down in an Oregon case.[5] That court held that an officer *de jure* cannot recover salary while his office is in the possession of an officer *de facto*, if the right to office has not been finally determined in an action brought expressly for that purpose.

A number of other New York cases are directly in point.[6] The facts of this case were that the plaintiff was appointed assistant clerk for the Sixth District of New York City. One Keating was appointed successor before plaintiff Dolan's term had expired. Keating performed the duties of the office and collected part of his salary. Finally, Keating was ousted, and Dolan reinstated. The *de jure* officer thereupon sued to recover the salary for the period he was kept out. The court held that payment of the salary to the officer *de facto* was a defense. If the salary has not been paid, the *de jure* officer may recover. In an Indiana case,[7] it was held that a *de jure* officer could, however, recover from the officer *de facto* the salary received by the latter. In another New York case,[8] it was held that an office in this country is not property. The right to the emoluments to the office does not grow out of contract between public corporations and the individual. A person who has been kept out of office, and has not performed the services, cannot recover the fees of such office, where there has been a *de facto* officer who performed the services and collected the fees during the incumbency.

That court adhered to the same principle in a later case.[9] In the case referred to, the plaintiff was elected assistant alderman for the city of New York, but one Peter Culkin, was seated. McVeany began *quo warranto* proceedings against Culkin, and the latter was ousted. The plaintiff had given notice to the comptroller of the city that he had a judgment of ouster against Culkin, and warned him not to pay Calkin the salary of said office. Notwithstanding this fact, the comptroller did pay Culkin. In an action by McVeany to recover salary, it was held that as to the salary accruing and paid before judgment of ouster there could be no recovery; as to such part of the salary payment was a complete defense, but as to the salary accruing after judgment of ouster paid to a *de facto* officer, the corporation was liable. In Shannon v. Portsmouth,[10] the plaintiff was appointed constable by the mayor and council of the city. The charter of the city empowered the mayor and council to remove the constable for sufficient cause. Shannon was suspended from duty on the force, but was later reinstated. He sought to recover salary for the time during which he had been suspended. It was held he could not recover, although he was ready and offered at all times to perform the duties of his office during his suspension.

In a Missouri case,[11] the plaintiff was appointed policeman. Later he was suspended by the mayor. In an action to recover salary for the time he was suspended he recovered in the lower court, but on appeal the de-

[4] 88 N. Y. 251.
[5] Selby v. Portland, 14 Oreg. 243.
[6] Dolan v. Mayor, 68 N. Y. 274.
[7] Glassbeck v. Lyons, 20 Ind. 1.
[8] Smith v. Mayor, 37 N. Y. 518.
[9] McVeany v. Mayor, 80 N. Y. 185.
[10] 54 N. H. 183.
[11] Westburg v. City of Kansas, 64 Mo. 493.

cision was reversed, the court holding that an office is not a vested right, and that the officer has no property in an office. In Minnesota, the courts[12] have followed this doctrine. In this case Parker was elected district attorney for Dakota Co. One Smith received the certificate of election, entered on the duties of his office, and collected salary until ousted. Parker, the *de jure* officer, brought an action to recover the salary paid Smith. Parker did not formally demand the office, nor did he warn the disbursing officer not to pay Smith, so the court did not discuss what effect such actions would have had. The court, however, decided that Parker could not recover. It was argued that it was contrary to "public policy" to allow a recovery, and that disbursing officers may pay salaries to *de facto* officers holding under color of right. In a Kansas case,[13] one Anderson sued to recover salary as county clerk, alleged to be due from the board of commissioners. The certificate of election was awarded to Anderson, but the right to office was contested by Wildman. The contest court annulled the certificate of election given Anderson and seated Wildman, who collected the salary while in office. Later the supreme court reinstated Anderson. The court,[14] in deciding this case, held that Anderson could not recover the salary paid Wildman as officer *de facto*.

The Supreme Court of Nebraska, in deciding this question,[15] said: "The question presented for determination is whether a *de jure* county officer can recover the salary or compensation which attaches to the office while it is in possession of an officer *de facto*, who before any judgment of ouster had been paid by the county the salary of the office. The question has never been passed on by this court, and the decisions in other States are conflicting. In establishing a precedent we shall adopt the rule which seems to us the best supported by reason, and in harmony with judicial principles." It was held that the *de jure* officer could not recover. Continuing the court added: "The county board had a right to rely on the apparent title of the officer *de facto*, and to treat him as an officer *de jure*. The different phases of this question were decided in a large number of other cases.[16] Lastly, is the authority of Prof. Floyd R. Mechem, who, in his very able work,[17] says that the weight of authority is as herein stated. The contrary doctrine was held in Maine.[18] Mr. Freeman, in a footnote to this case,[19] says: The principal case, and cases in California and Tennessee, maintain the doctrine, against the weight of authority, but in harmony, we think, with judicial principles, for the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county or other public body charged with the duty of making its payments.[20] In conclusion, therefore, it is maintained that by the great weight of authority, where a municipality or other public body has paid to a *de facto* officer the salary of the office before any judgment of ouster in good faith, such payment is a complete defense to an action brought by the *de jure* officer to recover the same salary.

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[12] Parker v. Supervisors, 4 Minn. 59.

[13] Commissioners of Salena Co. v. Anderson, 20 Kas. 298.

[14] In support of this view, the court cited among other cases: Auditors v. Benoit, 20 Mich. 176.

[15] State v. Mile, 54 N. W. Rep. 521.

[16] Connor v. Mayor, 5 N. Y. 285; Shaw v. Pine Co., 18 Pac. Rep. 273; Michael v. New Orleans, 32 La. Ann. 1094; Wheatley v. City of Covington, 11 Bush, 18, 33 Ohio St. 18, 5 Wend. 234; McAffee v. Russell, 29 Miss. 84.

[17] Mechem's Public Officers.

[18] Andrews v. Portland, 79 Me. 844.

[19] Andrews v. Portland, 10 Am. St. Rep. 280.

[20] In support of this view, the learned author cites the following cases: People v. Smyth, 48 Cal. 21; People v. Oulten, 28 Cal. 44; Memphis v. Woodward, 12 Heisk. 499; Mathews v. Supervisors, 53 Miss. 713; McCue v. County of Wapallo, 56 Iowa, 698; Glasscock v. Lyons, 28 Ind. 1; Douglas v. State, 31 Ind. 429.

HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—VALIDITY—BURDEN OF PROOF—SUBSEQUENT CRUELTY OF HUSBAND—CANCELLATION—CONSIDERATION—STATUTE OF FRAUDS.

FISHER v. KOONTZ.

Supreme Court of Iowa, October 18, 1899.

1. An antenuptial contract providing that the wife shall acquire no interest in the husband's estate is binding.

2. Marriage is sufficient consideration for an antenuptial contract whereby the wife relinquishes her marital rights in the husband's property.

3. Courts will rigidly scrutinize an antenuptial contract apparently unjust, especially where it deprives

the wife of her interest in the husband's estate without providing for her in case she survive him.

4. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured.

5. An antenuptial contract whereby a wife relinquishes her marital rights in her husband's estate will be upheld where it appears she knew the extent of his estate, and was ready to waive such rights in order to overcome the opposition of his children to the marriage.

6. Cruel and inhuman conduct by a husband toward his wife, condoned by her, does not work a forfeiture of an antenuptial contract between them.

7. Code, § 3154, providing that, "when property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them," does not prohibit a husband and wife from making a postnuptial contract canceling an antenuptial agreement, and restoring her marital property rights, which she had relinquished.

8. The inchoate distributive share of a wife in her husband's estate, is property, within the meaning of Code, § 3157, authorizing a husband or wife to execute conveyances to the other.

9. An oral postnuptial contract canceling an antenuptial agreement and restoring to a wife her marital rights in her husband's real estate is a contract relating to the "creation of an interest in lands," and unless the consideration, in whole or in part, has been paid, is void under the statute of frauds.

10. Where a wife, who has merely threatened to leave her husband, and sue for divorce, on account of his cruelty, condones past wrongs, the condonement is not such a consideration as will support an oral contract made between them canceling an antenuptial agreement and restoring her marital rights in his estate.

Action by the plaintiff, as widow of T. J. Fisher, deceased, to have her distributive share in certain real estate of which he died seised set apart for her. The administrator and heirs set up in their answer the execution of an antenuptial contract by the terms of which the plaintiff had agreed that she should "not have, as wife or widow, any interest of any kind, by way of ownership, in any property, real or personal, now owned by Thomas J. Fisher." In her reply the plaintiff averred that this contract was procured through fraud, had been forfeited by cruel and inhuman conduct, and that it was annulled and canceled by a postnuptial agreement. Decree was entered as prayed, and the defendants appealed. Reversed.

LADD, J: The plaintiff and the deceased were married August 31, 1893, she then being 42 and he 68 years of age, and they lived together until his death, in 1897. Prior to their marriage, a contract was entered into by them, whereby she was to acquire no interest in his property. That such a contract is binding is well settled. Jacobs v. Jacobs, 42 Iowa, 600; Ditson v. Ditson, 85 Iowa, 276, 52 N. W. Rep. 203; Peet v. Peet, 81 Iowa, 172, 46 N. W. Rep. 1051. Fisher then owned property of the estimated value of over $12.000. No provision whatever was made for his wife, nor did he waive his prospective interest in her estate, valued at $500. The marriage furnished a valuable consideration, sufficient upon which to base the relinquishment made by the wife. Schouler, Dom. Rel. § 173; 2 Pars. Cont. (6th Ed.) 75; Michael v. Morey, 26 Md. 239; Pierce v. Pierce, 71 N. Y. 154; 14 Am. & Eng. Enc. Law, 545. After engagement, however, the parties stood in a relation of confidence, and each had the right to expect the utmost fairness in all their dealings. The husband was bound to frankly and truthfully disclose all facts and circumstances which might in any way affect the agreement to be made. The courts will rigidly scrutinize an antenuptial contract apparently unjust or unreasonable in its terms, and especially where it operates to deprive the wife of her interest in the husband's estate without provision for her in event she survive him. Kline v. Kline, 57 Pa. 120; Graham v. Graham (N. A. App.), 38 N. E. Rep. 722. In such a case the burden is cast upon the husband, or those who represent him, to show that the contract was fairly procured, in order to have it upheld. Spurlock v. Brown (Tenn. Sup.), 18 S. W. Rep. 868; Achilles v. Achilles (Ill.), 37 N. E. Rep. 693; Russel's Appeal, 75 Pa. St. 269; Pierce v. Pierce, *supra*.

2. Was the antenuptial contract fairly procured? The plaintiff insists that she was deceived in two respects: (1) In the amount of property owned by the deceased, and (2) by his representation that the agreement would not affect her contingent interest in his property. The evidence very satisfactorily establishes her knowledge of the extent of decedent's property before their marriage. She had visited his farms with Mrs. Rampe, and walked over them with him. They would hardly have done so without speaking of the ownership of the land. That they so did is established by the evidence of several witnesses, and is contradicted only inferentially by her daughter. Nor do we think this record justified the conclusion that she was induced to execute the contract on his representation that it would not deprive her of an interest in his property. True, her daughter declared that he so stated at the time the contract was drawn, and three other witnesses testified, in substance, that the deceased had said to each of them that he had told his wife the contract would not cut her out of her part in the estate. But, in the nature of things, the evidence of these witnesses cannot be directly contradicted, and for this reason must be scrutinized with caution. Markey v. Markey (Iowa), 79 N. W. Rep. 259; Watson v. Richardson (decided at the present term), 80 N. W. Rep. 407. On the other hand, Young, who prepared the instrument, and read it over to her, stated that he then expressed his belief that it would be binding on both parties. The children of the deceased were objecting to his marriage to the plaintiff, and the contract was made in part to

meet their opposition. This she well knew. Was she signing it to deceive them? Mrs. Rampe, her husband, and three other witnesses related that she had spoken to them of this contract, and had justified herself in executing it on the score of thinking it would not be right for her to come in and take what he and his first wife had accumulated by hard work. In 1895 a postnuptial contract, expressly recognizing the former agreement, was executed, and Ramsay, who prepared it, swore that it was read over to them and approved. Though the evidence is somewhat conflicting, there is little doubt but that the plaintiff fully understood the purport of the contract. She was anxious to marry the deceased, and was ready to waive any interest to be thereby acquired in order to overcome the only obstacle in the way, to-wit: the opposition of his children.

3. If the deceased was guilty of cruel and inhuman conduct, his offense had been entirely condoned by the plaintiff. This was done, not only by continually living with him thereafter, but by her express promise to do so. Under such circumstances, an action for divorce could not have been maintained, and we are of opinion that a forfeiture of the antenuptial contract did not result. As the parties had lived together happily long after she had forgiven his wrongs, if any there had been, she accepted his conduct as fulfilling his obligation as a husband; and in York v. Ferner, 59 Iowa, 487, 13 N. W. Rep. 630, there was no condonement, and for this reason the case is not in point.

4. But it is contended that the condonement was brought about and based on a postnuptial contract, by the terms of which the antenuptial agreement was canceled and annulled, and the right to a distributive share restored to the wife. Such an arrangement was not prohibited by section 3154 of the Code, providing that, "when property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them." The plaintiff had no interest in his estate, as she had been deprived of that by the antenuptial agreement. The oral contract, then, did not have for its subject her interest in his property, but an interest which he held in that of his own, and which she sought to acquire. Not only were they not prohibited from dealing with such an interest, but a subsequent provision of the statutes (section 3157) expressly authorized "a conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other." True, the postnuptial contract dealt with the inchoate distributive share of his estate which would have been acquired by her but for the prior agreement; yet it was none the less his property, and might be the subject of contract between them. Such a conclusion is not only in harmony with the statutes, but, in permitting the restoration of marital property rights, comports with sound public policy; otherwise, the hands of the husband and wife might be tied up forever by an understanding entered into before learning fully of the mutual trust and confidence engendered by and essential to well-being in that relationship.

5. Nor do we deem the evidence of the agreement in parol, under the circumstances of this case, necessarily inadmissible. The contract may well be said to relate to "the creation or transfer of an interest in lands" (Dunlap v. Thomas, 69 Iowa, 358, 28 N. W. Rep. 637), and unless the purchase money, in whole or in part, has been paid, it is within the statute of frauds. Code, §§ 4625, 4626; Craig v. Craig, 90 Ind. 215; Schouler, Dom. Rel. § 183. We have held that "purchase money," as used in section 4626, means the consideration. Devin v. Himer, 29 Iowa, 297; Seem v. Nysonger, 69 Iowa, 512, 29 N. W. Rep. 433; Harlan v. Harlan, 102 Iowa, 703, 72 N. W. Rep. 286. If, then, a good consideration passed to the deceased, on which was based an agreement abandoning the antenuptial contract, and granting the plaintiff the usual inchoate rights of a married woman in her husband's property, such agreement should be upheld. The discontinuance of a meritorious suit for a divorce, and the resumption of the married relations, has been held a sufficient and valid consideration for a conveyance of land or promise to pay money. Reithmaier v. Beckwith, 35 Mich. 110; Duffy v. White (Mich.), 73 N. W. Rep. 363; Adams v. Adams, 91 N. Y. 381; Phillips v. Meyers, 82 Ill. 67; Burkholder's Appeal, 105 Pa. St. 37; Sterling v. Sterling, 12 Ga. 201; Jodrell v. Jodrell, 9 Beav. 45; Rozell v. Redding, 59 Mich. 331, 26 N. W. Rep. 498. We have upheld a contract for the division of property in event of a decree of divorce being entered in a pending suit. Martin v. Martin, 65 Iowa, 255, 21 N. W. Rep. 595; Nieukirk v. Nieukirk, 84 Iowa, 367, 51 N. W. Rep. 10. Much stronger are the reasons for sustaining such agreements when based on an adjustment of differences, and a restoration of the family relation. Whether a return of the wife, after separation, on sufficient cause, where no action for divorce is pending, is a good consideration, such as will support an agreement to pay money, has not been settled. On the one hand, it is said such restoration of the conjugal relations must be conclusively presumed to have resulted from forgiveness and condonement of past wrongs, and that, because of the marriage *status* and the interests of society, it cannot be allowed to rest on so base a motive as that of acquiring money or property. On the other hand, it is asserted that, as the wife has the right, owing to the husband's fault, to live apart from him, to return to him, as it involves doing something she is under no obligation to do, may be a valid consideration. The opposing views are tersely stated by Justices Allen and Holmes in Merrill v. Peaslee (Mass.), 16 N. E. Rep. 274. Here there was no separation, nor action for divorce pending. Conceding the cruelty to have been established, there was no return of the wife, or restoration of the former relations, or dismissal of an action, as a basis of the alleged arrangement. There was simply an un-

executed threat to leave and institute suit for divorce and alimony, and we think refraining from carrying it out, and continuing in the existing relation, must be attributed to motives other and higher than those merely pecuniary. The troubles and difficulties of married life, which the husband and wife have forgiven or ignored without separation or suit, ought not to be unveiled to the public after death has severed that relation. Compensation for wrongs, under such circumstances, cannot be made in money. Their adjustment of differences must be conclusively presumed to have sprung from mutual affection, the interests of home and children, and their well-being in society, and not to have been induced by greed of wordly gain. See Miller v. Miller, 78 Iowa, 177, 35 N. W. Rep. 464, and 42 N. W. Rep. 641. Public policy forbids such inquiries, and the sacredness of the relation demands that conjugal *consortium* be kept without the domain of bargain and sale.

6. We do not understand anything to be claimed for the talk concerning the collection of the rent of the plaintiff's property by the deceased. If he was to have the use of it for life, no writing was drawn, as is made necessary under the statute of frauds, nor was it shown that he received the rent in pursuance of such an arrangement. We conclude that, as the antenuptial contract remains in force, the plaintiff is not entitled to a distributive share in the real estate in controversy. Reversed.

NOTE.—*Antenuptial Contracts.*—The parties to a proposed marriage may enter into an antenuptial agreement, whereby they may regulate the control and disposition of their property after marriage. Thus, the wife may waive her dower rights in her husband's property. Edwards v. Martin, 39 Ill. App. 145. She may also waive any statutory allowance during the settlement of her husband's estate (Appeal of Straub, 66 Conn. 127, 33 Atl. Rep. 615); but in Achilles v. Achilles, 137 Ill. 589, 28 N. E. Rep. 45, it was held that the wife, by antenuptial agreement, could not waive her homestead rights, as this was a matter of public concern which could not be thus affected by private contract. The husband likewise may waive his right of curtesy (Motney v. Linn [Kan.], 55 Pac. Rep. 668), and may convey his mortgaged interest to his intended wife. Klauber v. Vigneron (Cal.), 32 Pac. Rep. 248. The subsequent marriage is held to be a valuable consideration for these antenuptial contracts. Edwards v. Martin, *supra;* Prewitt v. Wilson, reported in the Central Law Journal, vol. XII., page 249. The contract must be reduced to writing in accordance with the requirements of the statute of frauds (Richardson v. Richardson, 148 Ill. 563, 36 N. E. Rep. 608; Lamb v. Lamb, 46 N. Y. Supp. 219, 18 App. Div. 250), or else it must be confirmed in writing after marriage. Buffington v. Buffington (Ind.), 51 N. E. Rep. 328; McAnnulty v. McAnnulty, 120 Ill. 26; Claypool v. Jagua, 135 Ind. 499, 35 N. E. Rep. 285. Marriage is not such a part performance as will take the contract out of the statute of frauds. Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. Rep. 810; Adams v. Adams, 17 Oreg. 247. For an interesting article upon the nature and requisites of an antenuptial contract, see the Central Law Journal, vol. IX., page 222. Marriage settlements are to be liberally construed, so as to carry out the intentions of the parties. Motney v. Linn (Kan.), 54 Pac. Rep. 668. They are generally governed by the law of the State where made, but this is not true where they relate to the acquisition or disposition of real property. In such a case, where there is a conflict of laws, the law of the *situs* of the real property governs. Lang v. Hess, 154 Ill. 482, 40 N. E. Rep. 335. In this case, an antenuptial agreement was entered into in Germany, by which the bride agreed to receive the groom to live at her house, and he adopted her two children by a former marriage. By the law of Germany, the children so adopted could not be disinherited. The parties afterwards came to the United States, and the husband acquired some real property in the State of Illinois. It was held that he might dispose of it in accordance with the laws of Illinois, regardless of the terms of the marriage settlement. In another case, *In re* Craft's Estate, 164 Pa. St. 520, 30 Atl. Rep. 493, it was held that a will of a single woman and a written consent thereto by her intended husband could not be construed together as an antenuptial contract, so as to prevent a revocation of the will by a subsequent marriage. The effect and operation of antenuptial contracts may best be shown by an analysis of some late cases illustrative of the subject. Thus, in an Indiana case, where a man and woman, intending marriage, entered into an antenuptial contract, whereby each retained full control of his or her property, a provision therein that the husband would support the wife was held not to be a condition on which the validity of the contract depended. Buffington v. Buffington (Ind.), 51 N. E. Rep. 328. In a contract similar to this, where the wife retained the right to dispose of her property by gift, sale, or devise, to such persons as she might desire, and there was no issue of marriage, it was held that the husband was not deprived of his right of inheritance as the survivor of the wife. Kistler v. Ernst (Kan.), 56 Pac. Rep. 18. Where, under the provisions of an antenuptial contract, the wife was to receive a certain portion of her husband's estate, and additional provision was made for her by her husband in his will, it was held that she could take both provisions, nothing appearing in the will to show that the husband intended its provisions to supersede the antenuptial contract. Taft v. Taft (Mass.), 40 N. E. Rep 860. An antenuptial contract, reciting a conveyance to the wife in full satisfaction of her dower rights, will prevent her from taking dower in the husband's property acquired by him after marriage. Bryan v. Bryan (Ark.), 34 S. W. Rep. 260. Where the wife contracts not to claim dower, nor any share in her husband's personal estate, this will not estop her from claiming under a policy on his life, issued during his first marriage, which provided that the proceeds thereof should be paid to his personal representatives for the benefit of his widow, if any. Van Dermoor v. Van Dermoor, 80 Hun, 107, 30 N. Y. Supp. 19. Where each party to an antenuptial contract waives all claims to the property then owned or thereafter to be acquired by the other, and it is also provided that upon the death of either party, his or her property shall descend to the heirs of that party, this does not bar the wife of alimony or obtaining a divorce for a willful refusal of the husband to support her. Stearns v. Stearns (Vt.), 28 Atl. Rep. 875. Where the wife living separate and apart from her husband has sufficient income from an antenuptial agreement, her husband is not liable for necessaries furnished her. Hurt v. Mayes, reported in the Central Law Journal,

vol. XXXIV, page 473. An antenuptial contract may be specifically enforced where such is necessary to effectuate the intentions of the parties. White v. White, 47 N. Y. Supp. 273. 20 App. Div. 560; Thompson v. Tucker Osborn (Mich.), 69 N. W. Rep. 730; Adams v. Adams, 17 Oreg. 247, 20 Pac. Rep. 633. Where it is made for the benefit of any person to whom the woman's property may pass by devise or descent, it may be enforced after her death intestate by her only child, the rule of priority through legal obligation having no application. White v. White, *supra*. But an illegitimate child, *en ventre sa mere*, at the time of the marriage settlement, cannot have a reputation of being the legitimate off-pring of the parents, so as to enable such child to take under a limitation to children in the settlement. Robinson v. Shaw, 8 Reports, 421. The wife will be enjoined from prosecuting a petition in the probate court asking for an allowance out of the estate of her husband, where by an antenuptial contract she has waived all claims to any part of her husband's estate, and has accepted the provisions made for her in the antenuptial contract. Paine v. Hallister, 139 Mass. 144, 29 N. E. Rep. 541.

Proceedings to set aside an antenuptial contract may be instituted by one of the parties to the contract, or by the creditors of one of the parties. The parties after betrothal stand in a confidential relation, and are bound to use the utmost good faith toward each other. Graham v. Graham, 67 Hun, 329, 22 N. Y. Supp. 299. If one party fails to make a full and fair disclosure of the circumstances bearing upon the antenuptial agreement, or is guilty of using fraud or undue influence, the contract will be set aside. Graham v. Graham, 143 N. Y. 573; 38 N. E. Rep. 722; *In re* Jones' Estate, 24 N. Y. Supp. 706, 3 Misc. Rep. 586; Simpson v. Simpson's Exer. (Ky.), 23 S. W. Rep. 361; Lamb v. Lamb (Ind.), 30 N. E. Rep. 36: Taylor v. Butterick, 165 Mass. 547, 43 N. E. Rep. 507. Where the provision for the wife is entirely disproportionate to the value of the husband's estate, a presumption that the husband concealed the value of the property will arise, and the contract will be set aside unless it is shown by clear proof that the wife knew the extent and character of the husband's estate, or else the circumstances were such that she could have known them. Hessick v. Hessick, 169 Ill. 486, 48 N. E. Rep. 712; Achilles v. Achilles (Ill.). 37 N. E. Rep. 693; Graham v. Graham, *supra*. Where the husband made a conveyance to his wife by virtue of an antenuptial contract, and the marriage ceremony was performed, and the parties lived together as husband and wife until the death of the husband, and it was then discovered that a former husband of the wife was still living, he having deserted her some twelve years before, it was held that the conveyance would not be set aside, it being supported by a sufficient consideration. Ogden v. McHugh, 167 Mass. 276, 45 N. E. Rep. 731. The mere fact that the wife joins her husband in conveyance of his land will not be regarded as an abandonment of an antenuptial agreement, providing that each shall convey his or her property as if unmarried. Peet v. Peet (Iowa), 46 N. W. Rep. 1051.

Conveyances made under antenuptial contracts may be set aside when in fraud of creditors. But marriage being a valuable consideration, the conveyance, when made before marriage, will not be set aside unless the fraud was participated in by both parties. Boggess v. Richard's Admr., 39 W. Va. 567, 20 S. E. Rep. 599; Prewitt v. Wilson, reported in Central Law Journal, vol. XII, page 249; Clark v. McMahon (Mass.), 48 N. E. Rep. 939. When made after marriage in fraud of creditors, it cannot be sustained by relation back to an oral antenuptial contract (Flory v. Houck, 186 Pa. St. 263, 40 Atl. Rep. 482; Keady v. White, 168 Ill. 76, 48 N. E. Rep. 314); nor by relation back to a written antenuptial contract. LePard v. Russell (N. J. Ch.), 39 Atl. Rep. 1059. Time is not of the essence of the marriage contract. It is sufficient if it be shown to have been executed by the parties before the marriage ceremony was performed. Sturns v. Hodnot (La.), 12 South. Rep. 561. A trust deed, constituting a voluntary antenuptial settlement, will not be set aside because it contains no power of revocation, nor restraint against anticipation of income. Taylor v. Butterick, 165 Mass. 547, 43 N. E. Rep. 507. A settlement on the husband by the wife will not be set aside for his adultery unless a condition to that effect is inserted therein. Chese v. Phillips, 153 Mass. 17, 26 N. E. Rep. 136.

Where the wife left her husband, but returned to him upon his promise to cancel an antenuptial contract to which she objected, this was held to be neither a valid nor a meritorious consideration for the promise, as it was her legal duty to return, having left without justification. *In re* Kessler's Estate, 143 Pa. St. 386, 22 Atl. Rep. 892. The abandonment of legal proceedings to have the antenuptial contract set aside affords no consideration for the husband to revoke it, if the settlement was valid, and would not have been set aside had the suit been prosecuted. *In re* Kessler's Estate, *supra*. Upon the whole subject of antenuptial contracts, see two valuable articles in the Central Law Journal, vol. XVII., page 384, and vol. XIX., pages 450, 451.

GEO. D. HARRIS.

St. Louis, Mo.

JETSAM AND FLOTSAM.

DUTY TO STOP TRAIN FOR FALLEN PASSENGER.

A novel decision was rendered in Reed v. Louisville & N. R. Co. (Ky.), 44 L. R. A. 823, holding that when a passenger is thrown or pushed from a train without any fault of his own, it is the duty of the railroad company to stop the train and rescue him if the circumstances are such that he is liable to [illegible] suffer great injury unless rescued, provided that this can be done without imperiling the other passengers, and that the trainmen could not provide for his rescue by other means. The fact that a passenger has, by accident or the wrongdoing of others, been thrown from his train, will not terminate his relation to the carrier. That he may be a passenger before he enters the train is well established by the cases cited in the note to Webster v. Fitchburg R. Co. (Mass.), 24 L. R. A. 521. It is equally certain that he may continue to be a passenger after leaving the train, as is shown by all the cases concerning injuries to a disembarking passenger on account of defective platforms and premises. The duty of the railroad company to care for persons thrown from trains upon its tracks and in such condition as to be in danger of being killed by other trains has also been enforced in Cincinnati, I. St. L. & C. R. Co. v. Cooper (Ind.), 6 L. R. A. 241, and Cincinnati, H. & D. R. Co. v. Kassen (Ohio), 16 L. R. A. 674. These decisions, although forming a new class, are abundantly justified by the fundamental principles which govern the duties and liabilities of common carriers.—*Case and Comment.*

THE MULE'S LATENT DEFECT.

"Can a mule have a 'latent defect?' Is there such a thing known to zoology as a 'good mule?' Which is the greatest menance to God fearing citizens, a mule or an express train going seventy-five miles an hour? These and similar questions arose in Judge Garrison's court this morning in the trial of the case of Lewis Savage against the Winslow brick people. Savage was at work shoveling clay into a brick machine, the hopper of which was level with the ground. A fellow employee drove in a load of clay with a mule named 'Turk' hitched to it. While Savage's face was turned from the mule the latter started to back, and it backed and backed until it tumbled Savage into the hopper, where he was ground up.

"The legal controversy between Judge Armstrong, counsel for the brick people, and Judge Westcott, for Savage—the man who was ground up—was whether the employers were not guilty of negligence, in not informing Savage of the latent defect in the mule's moral character.

"Humph!" ejaculated Judge Armstrong, "how can a mule have a 'latent defect?' The fact of his being a mule makes all his defects obvious at once.

"Nevertheless he traversed the peacability of the mule and examined a man named Jefferson on the subject.

"'Did you know this mule Turk?'

"'Yes, sir; I was personally acquainted with him.'

"'Was he a good mule?'

"'There never was a good mule, sir.'

"Judge Garrison didn't strike the answer from the record so it was in a measure judicially determined on the best sort of expert testimony (Jefferson being a negro) that there are no 'good mules' known to zoological science and that, as a corrolary proposition, mules can't have 'latent defects.'

"As soon as the evidence for the plaintiff was in Judge Armstrong moved for a nonsuit on the ground that the brick people had not been guilty of negligence, the plaintiff having been fully apprised of his danger. Judge Westcott tried to ring in extraneous matters so as to get the case to the jury, which contained two men of the same race as the colored plaintiff.

"This is only a question of the 'latent or obvious defect in the mule,' declared Judge Garrison, 'and the nonsuit is ordered.'"

ALIMONY AS A DEBT OF A BANKRUPT.

The question whether a decree for alimony is a provable and dischargeable debt of a bankrupt is said by Referee Hotchkiss, of Buffalo, to be one which "goes to the root of things." It has already arisen in several cases, and their conclusions upon it do not agree. In *Re* Houston, 94 Fed. Rep. 119, Judge Evans, of the United States District Court in the District of Kentucky, on a writ of *habeas corpus*, discharged a bankrupt from imprisonment under authority of a State court for omitting to pay certain installments of alimony while the bankruptcy proceedings were pending. The decision clearly proceeds on the ground that the bankrupt might be discharged from this obligation to pay alimony. The court said that U. S. Rev. St. § 753, manifestly includes cases of this character. In *Re* Van Orden, 96 Fed. Rep. 86, Judge Kirkpatrick, of the District of New Jersey, also holds that a judgment for alimony against a bankrupt constitutes a provable and dischargeable debt, because the bankrupt act extends the word "debt" to include any "fixed liability evidenced by judgment."

But in the Southern District of New York Judge Brown, in the cases of *Re* Anderson and *Re* Shepard, 21 N. Y. L. J. 1246, held that a liability to pay alimony would not be released by the discharge in bankruptcy, and that no stay should, therefore, be granted on its enforcement. These conflicting authorities leave the question altogether unsettled. Judge Evans discussed the case very briefly, and Judge Brown not at all. But a very elaborate discussion of the question is made in an opinion of William H. Hotchkiss, of Buffalo, as referee in bankruptcy, deciding, in *Re* Smith, reported in the New York Law Journal September 9 (1 Nat. Bkcy. News, 471), that, while the English courts treat a judgment for alimony as a debt, the American courts sustain a higher doctrine that makes the obligation of the husband, not a mere debt, but a continuing obligation to support the wife. He says: "It is something higher than a mere liability to pay; it is the obligation to support, which, taken on at marriage and continuing through life, has been measured up and temporarily determined by a court, but which is absolutely inalienable and undischargeable, and save in amount, beyond the control of the courts except with the consent or on the fault of the wife." The American cases which sustain contempt proceedings to enforce payment of alimony proceed on the theory that the obligation to pay alimony is not a mere debt, else such an enforcement would violate the constitutional provisions against imprisonment for debt.

There may seem to be a hardship in compelling a man to pay alimony when he has been compelled to turn over all his property in bankruptcy proceedings. Yet that is only the hardship that exists in every case where a man ordered to pay alimony becomes insolvent. This may be sufficient ground for leniency in the enforcement of the order, or even for changing it, but it is no concern of the bankruptcy court unless the obligation to pay the alimony is a debt.—*Case and Comment.*

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In your digest of the case of Narramore v. Ry. Co. (No. 53 Weekly Digest, current Number 16), the point in judgment which your digester has missed was that the doctrine of "assumption of risk" has no application in case of violation of a statute. This has been a doubtful question under the New York, Ohio and Massachusetts decisions. CHARLES M. CIST.

Cincinnati, Ohio.

BOOKS RECEIVED.

Handbook on the Law of Negligence. By Morton Barrows, A. B., LL. B., of the St. Paul Bar. St. Paul, Minn. West Publishing Co., 1900. pp. 634. Sheep. Price $3.75. Review will follow.

HUMORS OF THE LAW.

"A man who officiates as judge should be perfectly fair-minded, shouldn't he?" said a distinguished-looking man at Rennes.

"Of course."

"Well, we've got to quit letting in so much evidence for the defense. The first thing I know I'll find myself getting prejudiced in the prisoner's favor."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ASSIGNEE FOR CREDITORS — Accounting.—An assignee for creditors, who, without the consent of the creditors, continues generally the business of the assignor for a longer period than reasonable for finishing unfinished manufactured goods, with a resulting loss, does so at his own risk, and must account.—IN RE BROWN'S ESTATE, Penn., 44 Atl. Rep. 443.

2. BENEFICIAL ASSOCIATIONS — Mutual Benefit Insurance.—Where the constitution of a beneficiary union has no provision for suspension or forfeiture for nonpayment of dues, and the constitution of one of the subordinate societies composing said union has such provisions, the constitution and by-laws of the subordinate society govern.—POLISH ROMAN CATHOLIC UNION OF AMERICA v. WARCZAK, Ill., 55 N. E. Rep. 64.

3. BENEFIT SOCIETIES—Acquiescence—Suspension of Member.—Where a member who had surreptitiously left home was suspended for non-payment of dues, and his wife, who had notice of his suspension, and that the society refused to accept further payments of assessments, slept upon her rights for nine years, and until after she received news of his death, she cannot claim any rights as beneficiary under his benefit certificate.—MACDONALD v. GRAND LODGE A. O. U. W. OF KENTUCKY, Ky., 53 S. W. Rep. 282.

4. BILLS AND NOTES—Indorser—Looking to Maker.—Under Rev. St. art. 1204, authorizing the indorser of a bill to be sued without the maker being first sued, where the latter is "actually or notoriously insolvent," the maker must be without any property liable to execution to relieve from the necessity of suing him before looking to the indorser.—SMITH v. OJERHOLM, Tex., 53 S. W. Rep. 341.

5. CARRIERS OF GOODS—Injuries to Shipper's Servant.—A carrier owning and transferring a car over its own and connecting lines to a shipper for his use owes to him and his servants who must handle the car the duty of exercising due diligence in inspecting and putting the car in a reasonably safe condition for the proposed service; but, if the car be suitable and safe when it leaves the possession and control of such carrier, it has exercised due care in the premises.—OLSON v. PENNSYLVANIA & O. FUEL CO., Minn., 80 N. W. Rep. 698.

6. CARRIERS OF GOODS — Unjust and Discriminatory Charges.—When two railroad companies voluntarily enter into an agreement for joint rates, which covers all stations on their lines in the State, they virtually create a new and independent line, and become subject to the law preventing unjust discrimination and unreasonable exaction.—BLAIR v. SIOUX CITY & P. RY. CO., Iowa, 80 N. W. Rep. 673.

7. CONSTITUTIONAL LAW—Eminent Domain.—St. 1898, ch. 452, prohibiting the erection of buildings over 90 feet high on the streets adjoining Copley Square, in Boston, which is a public park, intended for the use of the public and surrounded by buildings devoted to religious, charitable, and educational purposes, is not unconstitutional, as it provides for compensation for injuries caused by such limitations.—ATTORNEY-GENERAL v. WILLIAMS, Mass., 55 N. E. Rep. 77.

8. CONTRACTS — Consideration—Fraud—Ultra Vires.—Where nearly all the stock of a corporation, with other property of the owner thereof, is sold on judgments against him to the judgment creditors, and the property fraudulently conveyed to the corporation by the judgment debtor for the stock is attached, and the corporation buys the stock, property, and judgments for the amount of the judgments and counsel fees incurred by the judgment creditors, there is a consideration to the corporation for the payment of the fees, as well as for the judgments.—SUTTON v. DUDLEY, Penn., 44 Atl. Rep. 488.

9. CONTRACTS — Quantum Meruit.—Where plaintiff sued on a contract and a *quantum meruit* in separate counts, and defendant admitted the contract on the trial, it was error to submit the *quantum meruit*.—TUFFREE v. STEWARD, Iowa, 80 N. W. Rep. 681.

10. CONTRACT TO MAKE WILL — Specific Performance.—Where a bill is filed which seeks to enforce the specific performance of a contract made with a decedent testatrix to give and devise her whole estate at her death, the executor of her will, who primarily takes the legal title to her personalty, and who has an equity to require the application of her lands to the payment of her debts (if need be), is a necessary party defendant, without whose presence the cause should not proceed.—KEMPTON v. BARTINE, N. J., 44 Atl. Rep. 461.

11. CORPORATIONS — Compensation of Directors.—Where the members of a committee authorized by a corporation to sell its plant were by agreement to receive compensation for their services, and certain of the directors, after the committee abandoned its efforts to sell, continued pending negotiations for the sale, traveling to distant cities, and spending much of their time and money in their efforts to sell, in which they finally succeeded after assuming large financial obligations for the corporation, they having reason to believe that they would receive compensation for their services, and a large majority of the stockholders having, before the services were completed, voted them compensation for past and future services, the court will not, at the instance of a dissenting stockholder, disturb their action.—HUFFAKER v. KRIEGER'S ASSIGNEE, Ky., 53 S. W. Rep. 288.

12. CORPORATIONS—Foreign Corporations—Taxation.—The payment, by a foreign corporation, under protest, of a license tax imposed by a State law claimed to be unconstitutional, will not be deemed voluntarily made when it was compelled to pay it to protect its property and continue its business in the State.—SCOTTISH UNION & NAT. INS. CO. OF EDINBURGH, SCOTLAND, AND LONDON, ENG., v. HERRIOTT, Iowa, 80 N. W. Rep. 665.

13. CORPORATIONS — Lease — Construction — Ultra Vires.—Defendant, a corporation authorized "to carry on a general brewing and malting business and manufacture and sell soda waters," rented from plaintiff premises which, by the terms of the lease, were "to be occupied for saloon and no other purpose whatever." Held, that it could not be said, as a matter of law, that the word "saloon" in said lease meant a place where intoxicating liquors were sold, and not a place for the sale of soda water, and hence the lease was not *ultra vires* the corporation, and it was liable for the rent.—BREWER & HOFMANN BREWING CO. v. BODDIE, Ill., 55 N. E. Rep. 49.

14. CRIMINAL EVIDENCE — Confessions.—Confession though obtained by a trick, a knife being produced, and defendant led to believe it was his, whereupon he stated where he had hidden his and told the story of the murder is admissible; there being nothing to indicate that through fear or hope a false confession was made. COMMONWEALTH v. CRESSINGER, Penn., 44 Atl. Rep. 483.

15. CRIMINAL LAW — Perjury — Testimony Before Grand Jury.—A grand jury investigating bribery charges may require a witness to testify to all matters which will aid it to return an indictment upon legal evidence; and all such testimony is touching a matter material to the point in question, so that, if false, such witness is subject to prosecution for perjury.—STATE v. TURLEY, Ind., 55 N. E. Rep. 30.

16. CRIMINAL LAW — Search Warrant.—A search warrant sworn out by defendant furnishes no justification for his acts, the officer having omitted to return it by defendant's direction, so that the acts done become trespass *ab initio*.—ANDERSON v. COWLES, Conn., 44 Atl. Rep. 477.

17. CRIMINAL LAW — Second Conviction — Presumption.—Where the judgment does not show whether the court, in sentencing accused on a second conviction upon a new trial, considered the time he had already served under his first sentence, as required by Code, § 5468, the presumption is that it did.—TRAVIS v. HUNTER, Iowa, 80 N. W. Rep. 680.

18. DEATH BY WRONGFUL ACT—Survivorship.—An action for personal injuries having been commenced by the injured person, and after his death carried on by his mother, as his administratrix, under Act April 15, 1851, § 18, giving to a common law action the quality of survivorship, damages cannot be recovered therein for his death under a section creating a new right of action, limited to cases where death is caused by violence or negligence, and no suit has been brought by the injured person in his lifetime, which right Act April 26, 1855, provides may be exercised by the husband, widow, children, or parents of deceased.—MCCAFFERTY v. PENNSYLVANIA R. CO., Penn., 44 Atl. Rep. 485.

19. DEED—Cancellation—Fraud.—When a deed given by parents to their adult child is attacked for the alleged fraud of the latter in procuring it to be executed, and it appears that the parents were feeble from age as well as illiterate, and that a relation of confidence and trust existed between them by reason of their dependency on such child, the burden is upon the child to show the fairness of the transaction.—BRUMMOND v. KRAUSE, N. Dak., 80 N. W. Rep. 686.

20. DEEDS—Construction.—The true intent of a deed must be gathered from the whole instrument, separate parts being viewed in the light of other parts.—MCCOY v. FAHRNEY, Ill., 55 N. E. Rep. 61.

21. DEEDS—Life Estate—Remainder to Children.—A deed from a father to his married daughter recited that the grantor, in consideration of love and affection, granted to the grantee and her bodily heirs certain real estate, and provided that the property conveyed should not be sold, but the income should go to the support of the said grantee and her family during her natural life, and at her death to be equally divided between her bodily heirs. Held, that grantee took an estate for life only, with remainder in fee to her children.—SIMONTON v. WHITE, Tex., 53 S. W. Rep. 389.

22. EVIDENCE—Account Books.—A ledger to which entries made in a blotter or day book were transferred is not admissible in evidence, not being a book of original entries.—ESTES v. JACKSON, Ky., 53 S. W. Rep. 271.

23. EVIDENCE—Receipt in Full.—A receipt in full is *prima facie* evidence of a settlement, which can be overcome only by evidence of fraud, accident, or mistake; and the mere fact that the person who gave it had a claim larger than the amount of the payment by which it was settled does not show mistake or omitted items of the account, from negligence, carelessness, or fault of his own.—MACDONALD v. PIPER, Penn., 44 Atl. Rep. 455.

24. FRAUDULENT CONVEYANCES—Evidence.—A conveyance of land, which, though absolute on its face, was given to secure the payment of a pre-existing debt, the value of the property being less than the debt, and which was made in that form at the request of the creditor, is not fraudulent, as an attempt to hinder or delay creditors.—DAVIS v. JONES, Ark., 53 S. W. Rep. 301.

25. GIFTS—Mortgages—Delivery.—Decedent conveyed land to his cousin, taking back a bond and mortgage, which, when executed, he redelivered to her, whereupon she returned them to him, and he said to her: "I am taking this to keep for you, so that, when I die, you shall have this property free and clear of any incumbrance. I am simply doing this at the request of my lawyer, and it will be of no account, because I am keeping it for you, to be delivered to you upon my death, on an order which I will sign to a party to deliver to you." Held sufficient to show a gift of the bond and mortgage *inter vivos*.—GANNON v. MCGUIRE, N. Y., 55 N. E. Rep. 7.

26. HIGHWAYS—Prairies—Prescription.—The rule that a public road cannot be established by prescription, where it runs over a prairie, does not apply where it is fenced on each side.—RAVEN v. TRAVIS COUNTY, Tex., 53 S. W. Rep. 855.

27. HOMESTEAD—Lien.—Where it was no part of the contract between the parties that borrowed money used to pay for a homestead should be so used, but the loan was made on other security, the creditor is not entitled to a lien on the homestead.—JOHNSON COUNTY SAV. BANK v. CARROLL, Iowa, 80 N. W. Rep. 683.

28. INDIAN LANDS—Improvements—Limitations.—The Cherokee statute of limitations, which provides that judgment shall not be rendered for the recovery of any improvement on the public domain in any suit unless instituted within three years next after the time of the accrual of the cause of action, applies to town lots and town sites which have been segregated from the public domain by law, and the right of occupancy sold to individual citizens of the nation.—RUSH v. THOMPSON, I. T., 53 S. W. Rep. 333.

29. INFANTS—Disaffirmance of Contract.—Where, in an action for debt, a writ of attachment is levied on goods of a minor, among which are goods purchased from plaintiff, and after sale of the goods, and before judgment against him, said minor gives a dissolving bond, obtains possession of the proceeds, and disposes of them, he cannot afterwards set up his infancy as a defense to the action.—SANGER v. HIBBARD, I. T., 53 S. W. Rep. 330.

30. INJUNCTION—Notice.—Under Rev. St. ch. 69, par. 3, authorizing an injunction without notice where it appears from the bill, or affidavit accompanying it, that complainant's rights will be unduly prejudiced if the injunction is not issued immediately, the propriety of so issuing the injunction appears where complainant avers positively that his rights will be unduly prejudiced, and he will be subjected to great damages and loss, if the injunction be not so issued.—VILLAGE OF ITASCA v. SCHROEDER, Ill., 55 N. E. Rep. 50.

31. INSURANCE — Premises Unoccupied.—Where a policy insuring a building "occupied as a dwelling

house" provided that it should be void "if the premises described" should be unoccupied for more than 10 days, the "premises" referred to were not the various buildings on the tract of land on which the insured dwelling house was located, but the dwelling house itself.—THOMAS v. HARTFORD FIRE INS. CO., Ky., 53 S. W. Rep. 287.

32. JUDGMENT—Action Against Dead Person.—Civ. Code Prac. § 51, subd. 6, providing for the service of process on the resident agent of a non-resident, does not authorize a judgment against a non-resident defendant who was dead when suit was instituted, though process was served on a resident agent in charge of his business.—SOPER v. CLAY CITY LUMBER CO., Ky., 53 S. W. Rep. 267.

33. JUDGMENT—Process—Service on Wrong Person.—Action to enforce stockholders' liability. The summons named John Lynch as a defendant, and the complaint alleged that he was a stockholder of the corporation. The summons was personally served on John M. Lynch, the appellant herein, who was never a stockholder, and in fact was not the person upon whom the summons ought to have been served. He, however, failed to appear, and judgment was entered against him by default. Held, that the judgment was valid.—UELAND v. LYNCH, Minn., 80 N. W. Rep. 709.

34. JUDGMENTS—Res Judicata — Execution Against City.—Where a city, in an action for land against it and others, declared that it sold the land to its co-defendant, a judgment in his favor, as between the city and him, will be regarded as conclusively establishing that it had conveyed the land as asserted, and is as effectual to pass the title to its co defendant as a voluntary conveyance.—GORDON v. THORP, Tex., 53 S. W. Rep. 357.

35. LANDLORD AND TENANT—Assignment of Lease.—Assignment of a written obligation to pay rent carries with it the landlord's statutory lien.—HATCHETT v. MILLER, Tex., 53 S. W. Rep. 357.

36. LIFE INSURANCE—Waiver of Forfeiture.—An insurance company cannot insist upon a forfeiture of a policy for the non-payment of premiums, where the agent of the company has solicited and received payment of premiums after the right to a forfeiture accrued, representing that the policy was in full force and effect.—METROPOLITAN LIFE INS. CO. v. MULLEADY'S ADMX., Ky., 53 S. W. Rep. 282.

37. MASTER AND SERVANT—Negligence of Fellow-Servant.—A section hand, who is injured in a collision between the hand car on which he is riding and another hand car, is within the protection of Code, § 2071, which renders railroad companies liable for injuries to their employees caused by the negligence of co-employees connected with the use and operation of the railway.—SMITH v. CHICAGO G. W. RY. CO., Iowa, 80 N. W. Rep. 658.

38. MINES AND MINERALS—Oil Lease—Termination.—Under a lease for operating for oil for the term of 10 years, "and as long thereafter as oil is found in paying quantities," in consideration of one-eighth of the oil, on the lessee failing, after the 10 years, to produce oil in paying quantities, the tenancy becomes one at will, not from year to year, and may be ended at any time by either party, without right to the lessee, if oil is afterwards discovered in paying quantities.—CASSELL v. CROTHERS, Penn., 44 Atl. Rep. 446.

39. MORTGAGES — Payment — Authority of Agent.—Where an agent of a mortgagee accepts a certificate of deposit in payment of a mortgage, and deposits it in the bank which issued it to the credit of his own account therein, the transaction is equivalent to a payment in cash.—HARRISON v. LE GORE, Iowa, 80 N. W. Rep. 670.

40. MORTGAGE DEED—Assignment for Creditors.—In consideration of a pre-existing debt, a debtor executed an absolute deed of wild land to his creditor, and at the same time the grantee executed to the grantor an instrument reciting the purchase as evidenced by the deed, and stipulating that the grantor might mine coal on the land, and for a reconveyance, on payment, within two years, of the debt with accrued interest. Held, that the deed was clearly intended as a mortgage.—SELLERS v. SELLERS, Tenn., 53 S. W. Rep. 316.

41. MUNICIPAL CORPORATIONS — Defects in Street.—A complaint which alleges that defendant city, by its agents, made an excavation in its street, and left it unguarded, and that plaintiff, being ignorant of its existence, was injured thereby, while exercising due care, and without any fault on his part, states a cause of action.—CITY OF GOSHEN v. ALFORD, Ind., 55 N. E. Rep. 27.

42. NEGLIGENCE—Defective Premises—Injury to Fireman.—At common law the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building.—HAMILTON v. MINNEAPOLIS DESK MFG. CO., Minn., 80 N. W. Rep. 693.

43. NEGLIGENCE — Injury to Railroad Employee.—A switch engine with a tub pilot in front and a tank and tub pilot behind had iron handholds 18 inches long attached to each end of the base of the pilot, leaving a space 3 1-2 feet over the main part of the pilot without a handhold. Plaintiff, in stepping on the footboard to make a coupling, stepped on the air hose lying on the footboard, and in putting out his hand to the drawbar, the handhold being behind him, he lost his balance, and fell, and his leg was cut off. He was induced to assume the risk by a promise to replace the short by a long handhold. Held, that whether the failure to provide a continuous handhold was the proximate cause of the injury was for the jury.—WIBLE v. BURLINGTON, ETC. RY. CO., Iowa, 80 N. W. Rep. 679.

44. PARTNERSHIP — Notice of Dissolution.—Notice to plaintiff's traveling salesman that defendant had withdrawn from a firm to which the salesman sold goods for plaintiff was notice to plaintiff, so as to relieve defendant from liability for the price of the goods sold.—ACH v. BARNES, Ky., 53 S. W. Rep. 293.

45. PARTNERSHIP—Priority of Partnership.—Partnership creditors are entitled to priority in the distribution of partnership funds over a creditor of an individual partner.—IN RE STEWART'S ESTATE, Penn., 44 Atl. Rep. 434.

46. PARTNERSHIP OF PURCHASER WITH VENDOR'S AGENT.—Where an agent to sell property sells to a firm of which he is a member, without the knowledge of the principal that he is interested in the purchase, the partners of the agent cannot recover damages of the principal on account of misrepresentations made by the agent, they being parties to his violation of his trust.—PINEVILLE LAND & LUMBER CO. v. HOLLINGSWORTH, Ky., 53 S. W. Rep. 279.

47. PENALTY—Civil Action.—An action to recover a penalty for the violation of a city ordinance is a civil action, and the rules of practice in civil cases apply.—CITY OF GREENSBURG v. CLEVELAND, ETC. RY. CO., Ind., 55 N. E. Rep. 46.

48. PRINCIPAL AND SURETY — Contribution.—Where plaintiffs and defendants were sureties of a turnpike road company upon a guaranty executed by the company to a county court, undertaking that the company's road should be completed "free from debt" by a certain time, and plaintiffs advanced money to enable the company to complete the road free of debt within the required time, defendants may be required, under Ky. St. § 4665, to contribute their *pro rata* share to the payment of the sum advanced.—BOTTOMS v. LEONARD, Ky., 53 S. W. Rep. 273.

49. PROCESS—Names—Idem Sonans.—One whose surname is Bryan is not bound by a judgment and execution in a suit in which he was cited by the name of Bryant, since the names are not *idem sonans*.—WEIDEMEYER v. BRYAN, Tex., 53 S. W. Rep. 353.

50. PUBLIC LAND — Lands Derived from Indian Chief—Effect of Treaty as Grant.—A good title to parts of

the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of congress or any patent from the executive authority of the United States, if such is the intention of the treaty.—JONES v. MEEHAN, U. S. S. C., 20 Sup. Ct. Rep. 1.

51. RAILROAD COMPANY—Duty to Keep Lookout on Highway.—The fact that the servants in charge of an engine might, by the exercise of ordinary care, have discovered that a team on a highway parallel with the railroad had become frightened by the sounding of the whistle for a crossing, does not make the company liable for injuries resulting from the failure to substitute the ringing of the bell for the further blowing of the whistle, there being no duty to keep a lookout on the highway.—LOUISVILLE & N. R. CO. v. SMITH, Ky., 53 S. W. Rep. 269.

52. RAILROAD COMPANY—Injuries to Animals — Damages.—Under Rev. St. 1895, art. 4528, the right of recovery of an owner of stock, killed or injured by a railroad, is limited to its value at that time, and does not include interest.—ST. LOUIS S. W. RY. CO. OF TEXAS v. CHAMPLISS, Tex., 53 S. W. Rep. 343.

53. RAILROAD COMPANY—Killing Stock.—In an action against a railroad company for negligently killing plaintiff's horses, it appeared that they went upon the track at a road crossing; that the night was dark; that the fireman was keeping a lookout for stock; that he did not see the horses until they were but a short distance from the engine; that the train could not have been stopped within the distance between where they first came on the track and in range of the headlight and the place where they were struck, even if seen by the engineer or fireman as soon as they came on the track; and that the train could not have been stopped between the time they were first seen by the fireman and the time they were struck. Held, plaintiff could not recover, though defendant did not sound any warning for the crossing.—ST. LOUIS, ETC. R. CO. v. ZACKARY, I. T., 53 S. W. Rep. 327.

54. RAILROAD COMPANY — Street Railroads—Negligence.—In an action against a street railroad company to recover damages for a collision with one of its cars, an instruction "that if the defendant's employees operating the car failed to give timely warning of the approach of the car to a crossing, as required by the rules of defendant, or as was necessary for the proper safety of vehicles crossing the tracks, and that in any of the respects referred to defendant's employees were not exercising ordinary care, then the verdict should be for plaintiff," is not erroneous, as substituting the rules of defendant as a test of negligence.—HART v. CEDAR RAPIDS & M. C. RY. CO., Iowa, 80 N. W. Rep. 662.

55. SALE — Measure of Damages.—The measure of damages for the failure to deliver personalty sold is the difference between the contract price and the market price at the time of the breach, where there is nothing in the contract from which it can be inferred that the parties contemplated a different rule, or that such measure is inadequate.—KINPORTS v. BREON, Penn., 44 Atl. Rep. 436.

56. SEDUCTION—Evidence.—In a prosecution for seduction, the defense cannot prove the general reputation of the prosecutrix as to chastity.—STATE v. REINHEIMER, Iowa, 80 N. W. Rep. 669.

57. TAXATION—Gross Earnings of Insurance Companies.—Code 1897, § 1333, which imposes a tax of 1 per cent. on the gross earnings of insurance companies within the State, and which exempts them from the payment of all other taxes, State or local, except taxes on real estate and special assessments, is in conflict with Const. art. 8, § 2, which subjects the property of all corporations for pecuniary profit to taxation, the same as that of individuals.—HAWKEYE INS. CO. v. FRENCH, Iowa, 80 N. W. Rep. 660.

58. TENANCY IN COMMON—Collection of Rents.—Recovery by a tenant in common, against the estate of his deceased co-tenant, of his share of rents collected by deceased, does not bar a subsequent recovery of rents of other property held by them in common.—GEDNEY v. GEDNEY, N. Y., 55 N. E. Rep. 1.

59. TRIAL—Commenting on Failure to Call Physician as Witness.—In an action for personal injuries, counsel for defendant may properly comment on the plaintiff's failure to call as a witness his attending physician.—CITY OF WARSAW v. FISHER, Ind., 55 N. E. Rep. 42.

60. TRUST—Declaration of Trust.—An assignment to his wife of securities standing in his name was found after a decedent's death. The assignment stated that it was made to protect his wife from loss of bonds he had borrowed from her with which to raise money, and was signed by one witness, who testified that in executing the paper decedent told him he was about to use some of his wife's securities to obtain money, and, in order to save her from possible loss, was setting over to her certain securities of her own. Held, that the document should be sustained, as a declaration of trust.—COLLINS v. STEWART, N. J., 44 Atl. Rep. 468.

61. TRUST—Security to Indorsee of Note.—B, indorsee of a note of L, by taking a second mortgage from L to secure this and other indebtedness, does not become a trustee for K, the indorser, so as to relieve K from liability, though B purchases the property at sale under the first mortgage, which he also holds, for less than the amount thereof, when it is worth more than such amount.—FIFTH AVE. BANK v. KLAUS, Penn., 44 Atl. Rep. 450.

62. WATER COURSES — Dams — Riparian Owners.—Above a milldam were two lakes, which were really enlargements of the river, and riparian owners sought to reclaim lands overflowed by the lakes during portions of the year by deepening the river. Held that, such overflow not being surface water, the owners could not drain the lakes so as to impede or accelerate the natural flow of the river to the mill owner's dam.—HYATT v. ALBRO, Mich., 80 N. W. Rep. 641.

63. WATER RIGHTS—Dams.—A parol agreement between an upper and a lower dam owner, where the latter was built first, that, if the diversion of water by the upper dam should injuriously affect the water supply at the lower dam, the water should be restored, does not inure to the benefit of one who purchased the lower dam without notice thereof.—CAPE v. THOMPSON, Tex., 53 S. W. Rep. 368.

64. WILLS—Ademption of Legacy.—Money paid to a son by his mother's agent, for which he receipted to the agent as his interest in his mother's estate, was a satisfaction of the son's interest under his mother's will previously executed, by which he was given one-ninth of her estate after the payment of debts and certain specific legacies.—GLASSCOCK v. LAYLE, Ky., 53 S. W. Rep. 270.

65. WILLS—Designation of Legatee.—Parol testimony is admissible to explain the intent of a testator in making a bequest to the "Domestic Missionary Society," where there are a number of missionary societies to which such term might apply.—VAN NOSTRAND v. BOARD OF DOMESTIC MISSIONS OF REFORMED CHURCH IN AMERICA, N. J., 44 Atl. Rep. 472.

66. WILLS—Election—Rights of Devisees.—A testatrix devised specific parts of a tract of land, all of which it was supposed she owned, to her surviving children. After her death it was discovered that a part of it was owned by a deceased son, of whom the testatrix's surviving children were heirs. Knowing this, one of the devisees disposed of her interest in the tract under the will, which exceeded what she otherwise was entitled to claim; and after acquiring the equity of redemption in a sister's devise, which had been mortgaged in good faith and for value, she bought from the other children their claim therein as heirs of their deceased brother. Held, that she could not assert against the mortgage the claim which she had thus acquired by purchase and as one of her brother's heirs.—FARMINGTON SAV. BANK v. CURRAN, Conn., 44 Atl. Rep. 474.